United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4049
75-4055

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P/S

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and
CAPTAIN EUGENE L. COCHRAN,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Consolidated Petitions to Review an Order of the
Civil Aeronautics Board

REPLY BRIEF FOR PETITIONERS

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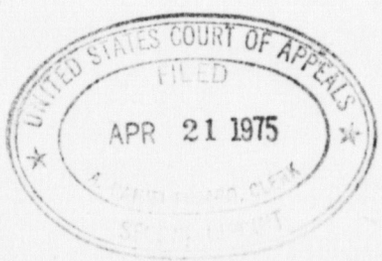

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I N D E X

AUTHORITIES CITED

CASES:

STATUTES AND REGULATIONS:

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Nos. 75-4049 and 75-4055

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and
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CIVIL AERONAUTICS BOARD

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REPLY BRIEF FOR PETITIONERS

This brief is submitted to reply to a new contention, raised for the first time in this litigation in the Brief of Respondent Civil Aeronautics Board. As we show below, the latest attempted rationalization for the Board's decision is even less persuasive than earlier attempts.

The new defense is that "a prolonged refusal to carry property, or particular types of property, is a matter necessitating a tariff filing rather than an embargo;" that the Board's "embargo regulation contemplates disability, not disinclination, to carry;"

and that the refusals to carry hazardous materials involved herein "were thus properly held to be beyond the scope of the embargo regulation." CAB Br. pp. 15-17. The new argument thus implies that the Board has simply exercised its inherent authority to assure the airlines' compliance with its administrative and procedural regulations -- that the Board is merely sorting tariff and embargo matters as a grocer sorts apples from oranges.

The argument will not withstand analysis. 1/ The Board's regulations define an "embargo" as ". . . the temporary refusal by an air carrier to accept for transportation. . . any commodity, type or class of property (other than passenger baggage) duly tendered, where, because of lack of facilities or personnel, or because it is required to give preference or precedence to other traffic entitled to priority, or because of other compelling reasons not within the control of the carrier, it is temporarily unable to perform all of the authorized transportation service requested of it." 14 C.F.R. Section 228.1. As we showed before the Board (see ALPA's February 25, 1975 Response,

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1/ Because of the patent implausibility of the government's latest theory, we shall not dwell on the apparent impropriety involved in such eleventh-hour, post hoc rationalization (see, N.L.R.B. v. Food Store Employees Union, Local 347 (Heck's, Inc.), 417 U. S. 1, 9 (1974); N.L.R.B. v. Metropolitan Life Ins. Co., 380 U. S. 438, 444 (1965); Burlington Truck Lines, Inc. v. U. S. 371 U. S. 156, 168-69 (1962); Trailways of New England, Inc. v. C.A.B. 412 F.2d 926, 930-31 (1st Cir. 1969)), or on that deriving from the Board's attempted modification of the purported basis for its action subsequent to its loss of jurisdiction pursuant to Section 1006(d) of the Act (see Braniff Airways, Inc. v. C.A.B., 379 F.2d 453 (D. C. Cir. 1967)).

submitted herein as Motion to Stay Appendix B, at pp. 21-22), and as we expressly pointed out in our initial brief to this Court (ALPA Br., pp. 21-22, 26), the Board's action in this case was not authorized by this provision, nor by any provision of the Board's rules, the regulations of DOT/FAA, or the Federal Aviation Act.

Here, the airlines announced that pursuant to the Safe Transportation of People program they were temporarily refusing to accept a number of types of hazardous freight for transportation. Such refusals clearly fell within the above-quoted definition of an "embargo". Indeed, the carriers' inability to ship this cargo derived from all three of the definition's specified conditions. Thus, the airlines suffered under a "lack of facilities or personnel" since they had no pilots to fly these commodities. Under the S.T.O.P. program, moreover, the carriers were "required to give preference or precedence" over the questionable restricted articles to the safe carriage of passengers and non-hazardous freight. And, finally, the carriers' recognized inability to carry these items safely stemmed from "other compelling reasons not within the control of the carrier[s]"; for, the airlines and their employees were clearly unable to remedy the failure of DOT/FAA's education, inspection and enforcement program for hazardous materials shipping rules, a failure measured by a conceded rate of non-compliance in the range of 75 to 90 percent. In short, the CAB's embargo regulation is fully applicable to the present situation and extended argument on the issue would be superfluous.

The real fallacy of the Board's new argument, however, is its attempted distinction between embargo and tariff matters. Both are merely forms of notification to the public of the types of freight the airlines will transport and the rates and conditions

governing such shipments. 2/ The DOT/FAA complaints initiating the CAB proceedings below challenged the airlines' use of both tariffs and embargoes to implement Operation S.T.O.P., on the theory that airlines were obligated to accept whatever property the government regulations allowed and they were thus "no longer free to determine that the balance should be struck more in the interest of safety." Motion to Stay Appendix A; Supp. Doc. 1-5. The Board itself quickly accepted the DOT/FAA theory, explaining in Order 74-2-127, at p. 3, that the embargoing airlines were "in derogation of [their] common carrier obligation to carry, and their statutory obligation to provide adequate service." As requested by DOT/FAA, the CAB has rejected both tariff and embargo filings restricting the carriage of hazardous articles (see, for example, the attachments to this brief, infra); 3/ and the Board continues

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2/ Tariffs are effective only after 30 days' notice (Section 403(c) of the Act, 49 U.S.C. 1373(c)); embargoes are effective on 24 hours' notice and automatically continue in effect for 30 days, or for such longer period of time as the airline has an application for an embargo extension pending (14 C.F.R. Section 228.2 and 5).

3/ The Board has done so despite the fact that, as noted in our opening brief at pp. 21-22, its own regulations provide that airline tariffs for explosives and other dangerous articles ". . . may contain restrictions on the extent to which participating carriers will accept for transportation such explosives and other dangerous or restricted articles" (14 C.F.R. Section 221.104), so long as the tariffs show ". . . the articles which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking and labeling requirements have been met" (14 C.F.R. Section 221.38(a)(5)).

to hold to the theory that air carriers must accept undesired hazardous freight, now stating: "These embargoes and tariff provisions would prohibit the carriage of many items necessary for nonhuman medical and various research purposes, and are in derogation of the carriers' common-carrier obligation to carry and their statutory obligation to provide adequate service." Order 75-4-75, at p. 7. (See, also, Order 75-3-61, at pp. 3-4, denying ALPA's request for a stay, overruled by this Court on March 25, 1975). Thus, except as articulated in its brief herein, the Board's position has always been that it would "reject" all airline tariff and embargo filings restricting the carriage of allowable hazardous articles, on the ground that the airlines had a general obligation to provide such service.

Yet, under federal law, it is for the airlines and their employees to decide which dangerous articles they will accept for carriage on passenger and cargo aircraft. Such determinations are not ordinarily reviewable by the CAB; and as shown in our initial brief, the Board is entirely without authority to interfere with such good faith safety judgments, as attempted herein, by precluding the carriers from notifying the public of their determinations by means of tariffs and embargo notices filed in accordance with the Board's own rules.

Thus, Section 1111(a) of the Act provides, in relevant part, "Subject to reasonable rules and regulations prescribed by the Administrator, any [air carrier may] refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." We showed in our initial brief that the Administrator's hazardous materials regulations merely bar the acceptance

of dangerous articles which do not meet the government's specified standards for packaging, labeling, etc. (ALPA Br. pp. 3-4, 35-37, 1d-1g); the Board does not contest this interpretation in its responding brief and does not dispute that DOT/FAA rules require only the rejection, and never the acceptance, of hazardous freight. 4/ We demonstrated in our opening brief that the legislative history of Section 1111(a) establishes that it applies to rejections of dangerous cargo, as well as passengers, and also that the sole basis necessary for a lawful refusal to carry is the honest belief of the carrier or its employees that the cargo or passengers may prove dangerous (ALPA Br. pp. 33-35); the CAB's responding brief does not differ with this showing. Nor does the Board contest our point that Section 1111(a) supersedes Section 404's general duty to provide service and immunizes refusals to provide transportation from attack, Williams v. Trans World Airlines, Inc., 509 F.2d 942, at 946-49 (2nd Cir. 1975).

However, there has been no challange whatsoever to our proof that, as a practical matter, the DOT/FAA minimum safety rules for hazardous materials shipments are so widely ignored that they have become nonexistent in the real world of shipping firms and freight docks (ALPA Br. pp. 4-13, 28-30); and there is no real dispute that the

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4/ If DOT/FAA rules did require the carriage of hazardous articles, then the proceedings below at the CAB would never have begun, for DOT/FAA could have proceeded to enforce its own regulations directly against the supposedly offending carriers and pilots.

Association has repeatedly requested effective relief from the appropriate aviation safety officials in government, without an adequate response (ALPA Br. pp. 13-18, 30-31). The Board does not claim that the S.T.O.P. program is anything other than a good faith response by the airlines and their pilots to the threat to aviation safety posed by the lack of meaningful governmental regulation over the transportation of hazardous materials by air, and the Board does not really take issue with the necessity for such a program, at least on a temporary, interim basis. 5/ In these circumstances, accordingly, it is clear

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5/ In CAB Order 75-4-75, at n. 6, p. 6, mention is made of the March 26, 1974 comments of the National Transportation Safety Board with respect to ALPA's position that all hazardous articles should be banned from interstate air transportation. The NTSB's explanation at that time was that it "shares the Association's concern, but believes that conscientious compliance with current regulations and procedures would obviate such a drastic step." Safety Recommendations A-74-20 through 26. Accordingly, as ALPA has repeatedly done, the Safety Board called for "a concerted program by the carriers and the FAA to assure compliance with current regulations." Id. Since then, however, much additional evidence has been adduced to the effect that FAA has yet to launch the "concerted program" for "conscientious compliance with current regulations" and that in excess of 75 percent of hazardous materials shipments continue to violate the safety regulations; ALPA's position is thus fully in line with that of the NTSB, as well as that of other expert observers (ALPA Br. pp. 4-12).

that ALPA and the airlines properly instituted Operation S.T.O.P. on February 1, 1975, and that the CAB was entirely without authority to attempt to interfere. 6/

6/ The Board claims that it has "imposed no new duty on the carriers" (CAB Br. p. 20), but such a "harmless error" defense cannot prevail here. For, without authority, the Board has unlawfully interfered with the express statutory right of airlines and their employees to reject freight which they deem inimical to safety of flight. The Board states that "Section 1111(a) does not contemplate wholesale refusals to carry" (CAB Br. p. 19) and that "freight which complies with FAA Regulations must be accepted for carriage by the carriers" (Order 75-4-75, at p. 7). On the basis of such general dicta, in support of which it has as yet to cite a single statute, regulation or judicial or administrative decision as authority, the Board has "rejected" all of the airlines' attempts, through tariff and embargo filings, to notify the public that certain types of dangerous freight were unacceptable for transportation. Furthermore, the Board has prejudged the principal issue presented in pending enforcement proceedings (see Order 75-4-75, at n. 4, p. 4), and all of this has been done without a hearing. As a practical matter, the Board's actions may well mean that airlines and their employees will be forced to attempt the impossible task of individually detecting the 75 percent or more illegal hazardous materials shipments offered for transportation each day.

CONCLUSION

For the foregoing reasons, and for those discussed in Petitioners' initial brief, the Court should grant the petitions to review and set aside CAB Order 75-2-127, and remand the case to the Board with instructions that the airlines' embargoes be reinstated and extended for so long as the carriers and their employees see fit.

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April 21, 1975.

TRANS WORLD AIRLINES, INC.

605 THIRD AVENUE
NEW YORK, NEW YORK, U.S.A. 10016

January 28, 1975

Mr. Foo-Ching Sun
Manager-Cargo Tariffs
Airline Tariff Publishers, Inc.
P. O. Box 17145
Dulles International Airport
Washington, D.C. 20041

Subject: Restricted Articles Tariff No. 6-D, CAB No. 82

Dear Foo-Ching:

Please file on January 31, 1975 for an effective date of March 2, 1975 to add the following exception for TW in Rule No. 9 (Loading and Handling Requirements For Aircraft) --

Rule No. 9(b)

EXCEPTION:(Applicable to TW only)

Articles listed in Section 11 of this tariff which are shown as being "Not Acceptable" on passenger aircraft will not be accepted on cargo aircraft.

Justification will be submitted under separate cover.

Sincerely,

W. H. Clarke
Director-Cargo Pricing
and Market Planning

cc: All Participating Carriers
C.A.B.-Bureau of Economics

JUSTIFICATION

Trans World Airlines, Inc. is herewith filing for an effective date of March 2, 1975, the following exception to Rule No. 9(b) in the Restricted Articles Tariff No. 6-D, C.A.B. No. 82:

EXCEPTION: (Applicable to TW only)

Articles listed in Section II of this tariff which are shown as being "Not Acceptable" on passenger aircraft will not be accepted on cargo aircraft.

In recent months, a major air carrier suffered two significant radioactive spills which attracted considerable public and industry attention. Additionally, in late 1973, another carrier's all-cargo aircraft was lost and such loss will probably be attributed to the carriage of certain other hazardous materials on board. Partially, as a consequence of these and other incidents involving the shipment of hazardous materials by air, several parallel activities are underway to review the propriety of allowing such airborne shipments.

Trans World Airlines is filing to modify its acceptance of certain such shipments pending the results of the following:

1. On January 3, 1975, President Ford signed into law an Act cited as the "Transportation Safety Act of 1974" (H.R. 15223) -- Public Law 93-633. This Act improves the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce. Under this law we expect the Secretary of Transportation, after review, to issue new regulations regarding the transportation of hazardous materials.

2. The FAA issued Notice of Proposed Rulemaking (NPRM) on April 25, 1974, proposing to amend Part 103 of the Federal Air Regulations which govern the carriage of dangerous articles on board civil air carrier aircraft. The preamble to this (NPRM) alludes to incidents which have been experienced (Docket 13668).

3. The Department of Transportation held a conference in October 1974 to examine the entire spectrum of the carriage of Dangerous Articles in Air Commerce. We expect the views expressed by interested parties will enable the D.O.T. to set a course whereby new regulations under authority of Public Law 93-633 will be enacted.

Under all the circumstances, the only sensible and sound course for TWA to follow is to file an exception in the Restricted Articles Tariff as indicated above until the questions surrounding the carriage of hazardous materials are resolved.

Section II of Restricted Articles Tariff No. 6-D, C.A.B. No. 82 lists certain articles which are not acceptable on passenger aircraft while they are permitted in specified quantities on cargo aircraft. TWA believes this current practice is not justified when viewed from a safety aspect. While there are no passengers on cargo aircraft, there are flight crews and ground personnel which must be considered along with the potential harm to TWA equipment.

In summary, the same reasons which lead to not accepting certain articles on passenger aircraft equally apply to cargo aircraft.

In view of the above, TWA urges the Civil Aeronautics Board to approve our filing.

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

February 28, 1975

IN REPLY REFER TO: B-65

Rejection Notice No. B-1037

Mr. C. C. Squire
President
Airline Tariff Publishing, Co., Agent
Dulles International Airport
P. O. Box 17415
Washington, D. C. 20041

Dear Mr. Squire:

The 18th Revised Page 23 to your C.A.B. No. 82, received January 31, 1975, and marked to become effective March 2, 1975, is hereby rejected as unlawful for violation of sections 221.21(c), 221.38(a)(5) and 221.165 of the Board's Economic Regulations in that the (1) print of the page is less that 8-point type, (2) proposed provisions of the "Exception" to Rule No. 9 (b) restricting the carriage of restricted articles on cargo aircraft are not in conformity with Part 103 of the Federal Aviation Regulations and (3) tariff transmittal fails to provide the required justification for the proposed provisions of the "Exception" to Rule No. 9(b).

The page rejected herein is void, without force or effect, and must not be used.

This action is taken pursuant to authority duly delegated in the Board's Regulations, 14 CFR 385.15. Persons entitled to petition for review of this action pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within seven days after the date hereof. This action shall become effective immediately, and the filing of a petition for review shall not stay the effectiveness hereof.

Very truly yours,

James W. Greene

James W. Greene
Chief, Tariffs Section
Bureau of Economics

RULES AND REGULATIONS

RULE NO. 7

SHIPPING DOCUMENTS (Continued)

(a) Shipper's Certificate (Continued)

Where the shipper states that the article does not fall within the scope of this tariff the carrier may in case of doubt on its part require the shipper to so certify. The carrier may also require the shipper to have this statement or the Shipper's Certification, as applicable, certified by an authority acceptable to the carrier.

(b) Airbill/Air Waybill

When the Airbill/Air Waybill is issued, the name of the restricted article, its class and type of label required for it (if any), all as shown in Section II, shall be inserted in the article description box of the Airbill/Air Waybill. If the shipment is acceptable only on cargo aircraft, the Airbill/Air Waybill shall also be marked "CARGO AIRCRAFT ONLY". The same Airbill/Air Waybill may cover other articles whether restricted or not restricted, but the restricted articles shall then all be stated separately on the Airbill/Air Waybill as required above.

8 QUANTITY LIMITATIONS FOR AIRCRAFT

Except as provided in the Rule, not more than 50 pounds net weight of any Restricted Article will be carried in any inaccessible cargo pit or bin on any aircraft:

(a) Not more than 150 pounds net weight of non-flammable compressed gas will be carrier in any inaccessible cargo pit or bin in any aircraft.

(b) Not more than 50 Transport Indexes of Radioactive materials will be carried on any aircraft.

(c) Not more than 440 pounds of Dry Ice, will be carried in any one cargo pit or bin on any aircraft except by special arrangements with the transporting carrier(s).

(d) Not more than 220 pounds net weight of polystyrene beads classified as ORA C will be carried in any inaccessible cargo pit or bin on any aircraft.

(e) Except for limitations per package as may be specified herein for particular articles and except for Explosives, Class C, no limitation shall apply to total quantity of Other Restricted Articles (ORA-Group A, B or C) and any other article which is not required to be labelled by this Tariff.

(f) This limitation does not apply to magnetized material (See also Rule 9(f)).

9 LOADING AND HANDLING REQUIREMENTS FOR AIRCRAFT

(a) Restricted Articles subject to the requirements of this tariff shall not be carried:

(i) in the cockpit of an aircraft.
(ii) in the cabin of a passenger aircraft.
(iii) (Applicable to OZ and PI only) on FH-227B aircraft.
(iv) (Applicable to NE and DL only) on FH-227 aircraft.
(v) (Applicable to SO only) on M-404 aircraft.
(vi) (Applicable to NE only) on De Havilland Twin-Otter aircraft, B-99 Aircraft and DC-3 Aircraft.

(b) Any restricted article acceptable only for cargo aircraft will be carried only when it can be loaded in a location accessible to a crew member in flight.

EXCEPTION: (Applicable to TW only)

Articles listed in Section II of this tariff which are shown as being "Not Acceptable" on passenger aircraft will not be accepted on cargo aircraft.

(c) Materials with a Flammable Solid, Oxidizer or Organic Peroxide label will not be placed next to or in a position to allow contact with a container of Corrosive label material in any aircraft.

(d) Dry ice will not be carried in the same belly or tail pit or bin with any live animal.

(e) Radioactive Materials bearing Radioactive Category II or III Yellow labels will be carried only when such materials can be loaded so as to not be located closer to persons, animals, or undeveloped film than as specified in the following table:

Total Number of Transport Indexes as stated on the Radioactive Yellow label of a single package entered on the line reading "Transport Index" (For two or more packages stored together, the total of the numbers of all such packages is meant).	Minimum separation distances in feet to nearest undeveloped film for various times of transit.					Minimum distance in feet to a space (or dividing partition between spaces) continuously occupied by persons or animals
	Up to 2 hours	2-4 hours	4-8 hours	8-12 hours	Over 12 hours	
None.	0	0	0	0	0	0
0.1 to 1.0.	1	2	3	4	5	1
1.1 to 5.0.	3	4	6	8	11	2
5.1 to 10.0	4	6	9	11	15	3
10.1 to 20.0.	5	8	12	16	22	4
20.1 to 30.0.	7	10	15	20	29	5
30.1 to 40.0.	8	11	17	22	33	6
40.1 to 50.0.	9	12	19	24	36	7

Note: The last column of the above table is based on a maximum transit time of twenty-four (24) hours. For longer transit time an appropriate adjustment shall be made.

(continued on next page)

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Reply Brief for Petitioners to be hand-delivered, this date, upon Glen M. Bendixsen, Esquire, Associate General Counsel for Litigation and Research, Civil Aeronautics Board, 1825 Connecticut Avenue, N. W., Washington, D. C.

Daniel M. Katz
DANIEL M. KATZ

April 21, 1975.